

D.P.U. 92-166

Petition of CMS Generation Co. and Montvale Energy Associates, L.P. to the Department of Public Utilities, pursuant to 220 C.M.R. 8.07(2), regarding the review of project scoring and designation by Boston Edison Company of the Award Group for RFP 3.

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Limited ParticipantI. INTRODUCTIONA. Procedural History

On January 31, 1992, CMS Generating Company and Montvale Energy Associates, L.P. (jointly, "CMS"), submitted a proposal for a Woburn Energy Project ("Project")<sup>1</sup> in Boston Edison Company's ("BECo's") third request for proposals ("RFP 3") from non-utility generators ("NUGs"). On July 3, 1992, CMS filed a complaint ("Complaint" or "Petition") with the Department, pursuant to 220 C.M.R. § 8.07(2), alleging that BECo erred twice in calculating the score that BECo identified for the Project and also erred in calculating the scores of other RFP 3 bidders. In particular, CMS contends that BECo should not have (1) reduced CMS' self-score for price by 2.5 points, (2) reduced CMS' self-score for Design/Engineering by 0.7 points, and (3) allowed lease financing to count as 100 percent equity in the scoring of competing project proposals in RFP 3, including Altresco,<sup>2</sup> L'Energia II, and Island End.

On July 10, 1992, the Department issued an Order of Notice that (1) set July 15, 1992 as the deadline to file a petition for leave to intervene in this docket, (2) established requirements for filing an answer or response to CMS' Complaint, and (3) set July 31, 1992 as the date to file any such answer or response. On July 10, 1992, Altresco filed a petition for leave to intervene in this docket. On July 14, 1992, the Attorney General of the Commonwealth ("Attorney General") filed

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<sup>1</sup> CMS proposed to sell power from a gas-fired combined cycle generating unit with 143 megawatts ("MW") of average capacity.

<sup>2</sup> The Altresco project was submitted by Altresco Financial, Inc. ("Altresco"), the limited participant in this proceeding. Altresco submitted a proposal in response to RFP 3 to sell power from 132 MW natural gas-fired combined cycle unit in Lynn, Massachusetts.

a notice of intervention pursuant to G.L. c. 12, § 11E. On July 23, 1992, the Hearing Officer issued a ruling (1) denying the petition to intervene of Altresco and (2) granting Altresco limited participant status to address the legal issues raised in this docket.<sup>3</sup>

On July 30, 1992, the Hearing Officer issued a notice that CMS could respond to Answers filed in this case no later than August 6, 1992. On July 31, 1992, BECo filed its answer ("BECO Answer") to CMS' Petition, accompanied by a Memorandum in Opposition to CMS' Petition ("BECO Memorandum") and affidavits by William P. Killgoar and John J. Reed. On July 31, 1992, Altresco filed an Answer in support of BECo's rescoring of CMS' proposal, accompanied by a motion for summary judgment ("Motion"). On August 6, 1992, CMS filed a Reply ("CMS Reply") to BECo's Answer and Altresco's Answer.

B. Background on BECo's RFP 3

Pursuant to approval by the Department, BECo issued its RFP 3 on October 11, 1991.<sup>4</sup> By January 31, 1992, the response deadline for proposals in RFP 3, BECo received 41 project proposals for a total of 3,300 MW.

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<sup>3</sup> On July 28, 1992, Altresco appealed to the full Commission the Hearing Officer's July 23, 1992 ruling denying Altresco's petition to intervene. On July 31, 1992, Altresco filed a motion for summary judgment, to which CMS responded on August 6, 1993. Because of the Department's disposition of this case, the Department need not rule on Altresco's appeal of the Hearing Officer ruling or the motion for summary judgment. We make no further findings regarding Altresco's status as a party or limited participant in this proceeding. Moreover, in light of our decision to reject the subject Petition, we expressly do not reach the issue of whether limited participants may file motions for summary judgment.

<sup>4</sup> As issued, BECo's RFP 3 provided for a tentative supply block within the range of 132 MW to 306 MW. Boston Edison Company, D.P.U. 90-270, at 35 (1991). The Department later set the size of the final supply block at 132 MW. Boston Edison Company, D.P.U. 90-270-C at 4 (1992).

On May 20, 1992, BECo petitioned the Department to defer further activities in RFP 3 to its first integrated resource management ("IRM") proceeding,<sup>5</sup> and in particular to defer announcing the award group and negotiating purchased power contracts with award group members. On June 1, 1992, BECo announced that it had selected the Altresco Lynn project proposal as the sole member of the RFP 3 award group. On June 2, 1992, the Department ordered BECo to announce the award group but granted a temporary stay of BECo's obligation to negotiate and execute a purchase power contract with the RFP 3 award group. Boston Edison Company, D.P.U. 90-130-1, at 11, 13 (1992). During the following month, CMS and three other project sponsors<sup>6</sup> submitted petitions to the Department, generally claiming that their bids were improperly scored, thereby challenging BECo's designation of Altresco as the sole award group member. In addition, two other project sponsors<sup>7</sup> filed petitions with the Department because of BECo's decision to disqualify their bids.

On June 25, 1993, the Department issued an Order denying BECo's May 20, 1992 petition to defer further activities in RFP 3. Boston Edison Company, D.P.U. 92-130 (1993). The Department required BECo to begin negotiating a purchase power contract with the RFP 3 award

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<sup>5</sup> On July 24, 1992, the Attorney General filed a letter in this docket that recommended that BECo's "RFP 3 bidders submit new bids relying on (after Commission review) updated BECo avoided costs." The issue regarding the filing of new bids with updated cost information was resolved by the Department's recent decision in Boston Edison Company, D.P.U. 92-130 (1993), by requiring BECo to negotiate with the award group based on the existing project proposals.

<sup>6</sup> The three other proceedings regarding allegations of improper scoring are Bio Development Corporation, D.P.U. 92-167; Concord Energy Corporation, D.P.U. 92-144; and Williams/Newcorp Generating Company, D.P.U. 92-146.

<sup>7</sup> The two proceedings regarding disqualified bidders were DLS Energy, Inc., D.P.U. 92-153, and West Lynn Cogeneration, D.P.U. 92-142. West Lynn Cogeneration has since withdrawn its petition.

group but suspended BECo's obligation to execute a contract with the RFP 3 award group until the Department issues final orders in the proceedings involving challenges to the rankings in BECo's RFP 3. Id. at 33-34.

On June 30, 1993, BECo filed with the Department a motion for immediate stay of the Department's June 25, 1993 Order in D.P.U. 92-130. In an Order dated July 14, 1993, the Department denied this motion. Boston Edison Company, D.P.U. 92-130-A (1993). Also on July 14, 1993, BECo filed an appeal of the Department's June 25, 1993 Order with the Massachusetts Supreme Judicial Court.

## II. STANDARD OF REVIEW

The Department's regulations governing the purchase of power from NUGs state that if, "at any time, a qualifying facility is aggrieved by an action of a utility pursuant to these regulations, the qualifying facility may petition the Department to investigate such action." 220 C.M.R. § 8.07(2). In reviewing any petition filed pursuant to 220 C.M.R. § 8.07(2), the Department applies a standard of "reasonableness." In Riverside Steam and Electric Company, D.P.U. 88-123, at 19-20 (1988), the Department stated

In reviewing the utility's actions, the Department will not substitute its own judgment for that of the utility so long as there is a reasonable basis for the utility's actions. Thus the Department will impose appropriate remedies only if it finds that, given what the utility knew or should have known at the time, its actions had no reasonable basis. Under 220 C.M.R. § 8.07(2), the burden of proof is on the aggrieved QF [qualifying facility].

Id. at 20; see also Destec Energy et al., D.P.U. 92-46, at 4-5 (1992) ("Destec"); EUA Power Corporation, D.P.U. 92-38, at 5 (1992); Riverside Steam and Electric Company, D.P.U. 88-123-B at 7, 50 (1991); and Boston Edison Company, D.P.U. 88-158, at 23 (1990).

Furthermore, the Department has recognized that in the management of its request for

proposals ("RFP") process, an electric company is allowed a measure of discretion:

[I]n matters concerning an approved RFP, the Department will allow an electric company a measure of discretion in administering and managing the RFP process. Allowing a measure of discretion at this stage in the RFP process is appropriate in light of the Department's regulations [220 C.M.R. §§ 8.00 et seq.] governing other stages of the RFP process where explicit requirements for the content of an RFP and the solicitation and contracting processes are evident.

Destec at 13. In Destec, the Department reaffirmed its position that electric utility companies may use discretion in implementing the instructions and requirements of an RFP, but also indicated that an electric company must administer its RFP in a manner that prevents favoritism and treats all project sponsors equitably. Id. at 13-14.

Additionally, the Department must endeavor to ensure that an electric company's scoring system is applied in a manner that maximizes net benefits to ratepayers. See 220 C.M.R. § 8.05(5)(c). Therefore, in assessing the reasonableness of BECo's application of its scoring system, the Department will consider whether a scoring decision appropriately recognizes the actual benefits that a proposed project offers ratepayers.

### III. RESCORING ISSUES

#### A. Introduction

CMS alleges that BECo made two improper adjustments when evaluating or rescoring CMS' proposal, and made an additional inappropriate scoring decision with respect to several of CMS' competitors' proposals. First, BECo eliminated 2.5 points that CMS had claimed in its price score, relating to estimated emissions from its facility. Second, BECo deducted 0.7 points from CMS' self-score on the Design/Engineering criteria, claiming that the energy balance and makeup water supply plans were insufficiently detailed. Third, CMS claims that BECo appears to have allowed, improperly, several competing projects that use lease financing to claim a score that

is appropriate only for equity financing.

B. Price Rescoring

1. Introduction

The price score dispute centers on how emissions from the Project should be treated in scoring the CMS proposal. Two issues arise: (1) the availability and score for offsets to emissions from the Project, and (2) how much of the emissions from a cogenerator should be attributed to electricity production and thus treated as external costs in scoring CMS' proposal.

2. Positions of the Parties

a. CMS

CMS contends that the Project's price score should be 2.5 points higher than that recognized by BECo, because its emissions reductions were not given sufficient credit by BECo (Petition at 2-3). CMS states that it deserved credit for reducing the existing emissions of the Project's steam host (*id.* at 2). After being informed by BECo that the Project would not receive credit for these offsets, on February 20, 1992, CMS provided to BECo revised, lower emissions data for the Project to justify the same price score CMS claimed in its initial proposal (*id.*). CMS states that the new emissions data for methane and sulfur dioxide provided to BECo were based on experience with a similar gas-fired unit operated by CMS in Midland, Michigan (*id.* at 3).

In addition, CMS claims that it should not be penalized for the emissions from its steam host's boiler during the 10 percent of the year that the electric generation project is not expected to operate (*id.*). CMS contends that its original emissions data were based on a 100 percent capacity factor for the project, while the revised data submitted on February 20, 1992 reflected the Project's expected 90 percent capacity factor (*id.*). Therefore, CMS maintains that BECo

should increase the score it gave CMS to reflect the revised information.

b. BECo

BECo claims that CMS' attempt to have its price score based on information provided to BECo after bids were due, using emission rates at the Midland plant, is not permitted under the terms of RFP 3 (BECo Memorandum at 14). In particular, BECo states that RFP 3 requires that the scoring of projects be based on information filed on or before the due date for proposals (id.).

BECo contends that it has not penalized CMS for the emissions of its steam host when the electric generator is not operating, since CMS' bid already reflects a 90 percent capacity factor (electricity would be produced 90 percent of the hours in the year):

The fact that Woburn's actual capacity factor is 90% is reflected in its January 31st bid on Evaluation Sheet 5, page 3B of 4, item (4) and page 4 of 4, item (6). These items show the project's energy bid in megawatt hours and are used to adjust the project's net emissions to correspond with its actual capacity rate. Accordingly, since CMS' bid already reflects a 90% capacity factor, an additional 10% reduction in emission rates ... would not only be incorrect, but would result in CMS receiving a double emissions rate credit (id.).

3. Analysis and Findings

The Department previously has determined that emission offsets should not be considered in the RFP 3 scoring process. D.P.U. 90-270, at 89.<sup>8</sup> CMS sought to modify the bid it initially had submitted, in order to justify its claimed score on different grounds, namely different emissions data. However, the RFP, which was approved by the Department on October 9, 1991, states that BECo must score project proposals based on information submitted with each proposal

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<sup>8</sup> The Department allowed one exception to this policy in RFP 3. The Department indicated that environmental externality adders for carbon dioxide need not be charged to facilities that burn wood if trees used to replace those used as a fuel supply are planted each year. D.P.U. 90-270, at 89.



(BECO RFP 3, § 4.3.4). Allowing new information after the deadline likely would lead to constant revisions to scores of other projects. The Department finds that BECO was reasonable in refusing to rescore CMS' proposal based on information submitted after the proposal deadline.

Even if BECO had considered CMS' new emissions data, CMS' bid already reflects a 90 percent capacity factor (i.e., the plant would not produce electricity during 10 percent of the hours of the year). Therefore, an additional 10 percent reduction in the emissions rate used in scoring CMS' proposal would amount to double-counting. Accordingly, the Department finds that CMS was not penalized for emissions from its steam host's boiler during the 10 percent of the hours in the year that the electric generator would not operate.

Accordingly, the Department finds that CMS has not shown that BECO's decision to deduct 2.5 points from CMS' self-score in the price category was unreasonable.

### C. Design/Engineering

#### 1. Introduction

The scoring system in RFP 3 provides for a maximum of three points for the Design/Engineering factor (RFP 3, Evaluation Sheet 8). The overall score for Design/Engineering is a function of the scores for particular subfactors or elements (id.). CMS contests BECO's scoring for two of the elements that comprise the Design/Engineering factor: "Energy, Process, & Other Applicable Balances" (also referred to as Heat Balance) and "Makeup Water Supply Plan" (CMS Complaint at 4). Under the RFP, projects for which "Final" plans have been submitted would earn top score, while "Detailed" plans would earn lower scores, and

"Preliminary" plans would earn no score.<sup>9</sup> Projects with "Final" plans for the two elements disputed by CMS would earn a total of 0.7 points, while "Detailed" plans would earn 0.5 points, and "Preliminary" plans would earn zero points (BEC Co RFP 3, Evaluation Sheet No. 8). BECo reduced CMS' Design/Engineering self-score by 0.7 points, finding that CMS' plans were "Preliminary" for each of the two elements.

2. Positions of the Parties

a. CMS

CMS contends that its score as adjusted by BECo should be increased by 0.7 points to reflect the level of detail in the Heat Balance and Makeup Water Supply Plan documentation that it submitted with its proposal to BECo (CMS Complaint at 4). In support of its claim, CMS submitted the Heat Balance and Makeup Water Supply Plan diagrams to the Department (CMS Complaint, Attachment C).

b. BEC Co

BEC Co claims that CMS did not present with its project proposal sufficient design details regarding its Makeup Water Supply Plan to warrant its self-score (BEC Co Memorandum at 15). On April 24, 1992, at BECo's request, CMS sent BECo additional information to clarify its Makeup Water Supply Plan. BECo claims that this information (1) was filed by CMS after the proposal was submitted, (2) supported BECo's conclusion that the information submitted in the proposal was general, (3) contained inadequate design detail, and (4) merited the designation "Preliminary" and therefore zero points (id.).

BEC Co claims that since CMS had only a preliminary major equipment list, it was

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<sup>9</sup> The terms "Final," "Detailed," and "Preliminary" are not defined in RFP 3.

impossible for CMS to develop its claimed "Detailed" level of documentation for the Heat Balance (id. at 15-16). Therefore, BECo maintains that awarding zero points to CMS for Energy, Process, & Other Applicable Balances was appropriate (id. at 16).

### 3. Analysis and Findings

The RFP approved by the Department establishes that it is the responsibility of the project sponsor to provide supporting documentation in sufficient detail to allow BECo to "unequivocally confirm" the representations made in the proposal (BECo RFP 3, § 4.3.6(b)). BECo decided that CMS' documentation was not sufficient to support CMS' representations on these two design points.

The Department recognizes that technical assessments about what plans are "Final", "Detailed", and "Preliminary" fall within BECo's discretion in managing its own RFP. The Department will not substitute its judgment for BECo's technical judgment in this case. From BECo's perspective, CMS' documentation, submitted in support of its score for Heat Balance and Makeup Water Supply Plan, did not unequivocally confirm CMS' representations and claimed score, as required under the terms of the RFP. Accordingly, the Department finds that CMS has not shown that BECo's adjustment to CMS' Design/Engineering score was unreasonable.

### D. Equity Capitalization Scores

#### 1. Introduction

The RFP 3 scoring system provides for a Capitalization Structure score of zero to five points and a Debt Coverage score of zero to six points (RFP 3, Evaluation Sheet 11). If a project's proposed financing reflects equity contributions of from one to ten percent, the Capitalization Structure score would be zero (RFP 3, Evaluation Sheet 11). Projects with equity

contributions of eleven to 20 percent, 21 to 30 percent, 31 to 40 percent, 41 to 50 percent, and more than 50 percent would earn scores of one, two, three, four, and five points, respectively (id.). If a project proposal's debt coverage ratio is 2.5 or more, the Debt Coverage score would be six points (id.). Debt coverage ratios of 2.00 to 2.49, 1.75 to 1.99, 1.50 to 1.74, and less than 1.50 would earn scores of four, two, one, and zero points, respectively (id.). CMS alleges that certain of its competitors claimed improperly high equity capitalization scores in self-scoring their proposals and that BECo accepted these improperly high scores in its scoring of the proposals.

2. Positions of the Parties

a. CMS

CMS alleges that the Altresco, L'Energia and Island End projects appear to have claimed the maximum points for the equity capitalization<sup>10</sup> and debt coverage ratio scoring criteria, by purporting to be 100 percent equity financed (CMS Complaint at 5). CMS indicates that it is reasonable to assume that the proponents of these projects plan to use traditional (single-investor) lease financing, asserting that to the extent that lease financing is used, these project sponsors will minimize their equity contributions (id. at 6). CMS thus asks that BECo (1) confirm that these three and any other projects claiming the maximum points are using true equity financing at the levels contained in their proposals, and (2) adjust the Capitalization Structure and Debt Coverage scores of any projects that will rely on lease financing to reflect the high degree of leverage implied by such financing arrangements (id. at 8).

In response to BECo's Answer, in which BECo agrees with CMS that traditional lease

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<sup>10</sup> The Department understands this phrase in this context to mean the Capitalization Structure category in RFP 3.

financing is equivalent to debt, CMS asserts that leasing arrangements of types not specified by BECo -- multiple-investor, operational, and/or non-traditional leases -- are also the equivalent of debt (CMS Reply at 5).

b. BECo

BECo agrees with CMS' position regarding traditional lease financing arrangements (BECo Memorandum at 17). In particular, BECo maintains that single-investor capital lease arrangements should be treated as debt, not equity, and that BECo scored the RFP 3 project proposals accordingly (id. at 17-18). In particular, BECo confirms "that it evaluated and scored all RFP 3 projects, including Altresco Lynn, L'Energia, and Island End, consistently with its position that capital lease arrangements are equivalent to debt, not equity" (BECo Memorandum at 18). BECo contends that CMS' apparent assumptions regarding the bids and scoring of other RFP 3 projects are erroneous (id. at 17). In response to concerns that a developer might indicate one financing arrangement in its bid but actually use another, BECo maintains that it will hold the Award Group to its representations regarding Capitalization Structure and Debt Coverage (id.).

3. Analysis and Findings

BECo agrees with CMS that lease financing is equivalent to debt. Moreover, BECo avers that it scored projects consistent with this position on lease financing, and that CMS has erred in its assumptions about the bids and scores of other RFP 3 projects. The record does not indicate that BECo has failed to apply the standard that lease is equivalent to debt, upon which CMS and BECo agree. Accordingly, the Department finds that CMS has not shown that BECo's scoring of other projects on the Capitalization Structure and Debt Coverage criteria was unreasonable.

IV. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That the petition of CMS Generation Company and Montvale Energy Associates, L.P. filed with the Department on July 3, 1992 be and hereby is DENIED.

By Order of the Department,